No. 86 1738

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

FRANCIS LACINA, DAVID GALBRAITH, BILL KNIGHT, GEORGE CRAIG, TED EDWARDS, CHARLES BEESON, DONALD EVANS, ROBERT BECK, LOU RESINGER, ANDREW ROGERS, BUCK GERMANY, DAN KELLEY, MARVIN GATES, WILBURT BOND, WILLIAM GONZALES, LESTER DIXON, FRANK MATNEY, and RICK BERNAS,

Petitioners,

vs.

G-K TRUCKING, GENERAL CABLE, PENN-CENTRAL CORP., G-K TECHNOLOGIES, EASTERN CARRIERS, and ROBERT JENSEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Does the six-month statute of limitations, borrowed from 29 U.S.C. § 160(b) (1982), applicable to a hybrid breach of contract-breach of duty of fair representation action require that the complaint be served, not merely filed in court, within the six-month period, thus superseding Fed. R. Civ. P. 4(j)?

LIST OF PARTIES

The parties to the proceedings below were the petitioners, Francis Lacina, David Galbraith, Bill Knight, George Craig, Ted Edwards, Charles Beeson, Donald Evans, Robert Beck, Lou Resinger, Andrew Rogers, Buck Germany, Dan Kelley, Marvin Gates, Wilburt Bond, William Gonzales, Lester Dixon, Frank Matney, and Rick Bernas, and the respondents G-K Trucking, General Cable, Penn-Central Corp., G-K Technologies, Eastern Carriers, and Robert Jensen.

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Petitioners,

vs.

G-K TRUCKING, GENERAL CABLE, PENN-CENTRAL CORP., G-K TECHNOLOGIES, EASTERN CARRIERS, AND ROBERT JENSEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Francis Lacina, David Galbraith, Bill Knight, George Craig, Ted Edwards, Charles Beeson, Donald Evans, Robert Beck, Lou Resinger, Andrew Rogers, Buck Germany, Dan Kelley, Marvin Gates, Wilburt Bond, William Gonzales, Lester Dixon, Frank Matney, and Rick Bernas respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on October 21, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 802 F.2d 1190 and is reprinted in the appendix hereto. *See infra* pp. A1-A10. The unpublished order by the Court of Appeals denying petitioners' petition for rehearing and suggestion for rehearing en banc is reprinted in the appendix hereto. *See infra* pp. B1-B2. The statement of uncontroverted facts and conclusions of law and order granting summary judgment of the District Court for the Central District of California (Ideman, J.), which are unreported, are reprinted in the appendix hereto. *See infra* pp. C1-C9, D1-D4.

JURISDICTION

Petitioners invoked the jurisdiction of the District Court for the Central District of California pursuant to the Labor-Management Relations Act, 1947, tit. III, § 301, 29 U.S.C. § 185 (1982). After the District Court entered summary judgment for respondents, a timely appeal to the Court of Appeals for the Ninth Circuit was taken.

The Court of Appeals rendered its opinion and judgment on October 21, 1986 and amended its opinion on December 30, 1986. A timely petition for rehearing and suggestion for rehearing en banc was denied on January 26, 1987.

This petition has been filed within ninety days of the denial of the petition for rehearing and is therefore timely pursuant to 28 U.S.C. § 2101(c) (1982) and Sup.

Ct. R. 20.4. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTE INVOLVED

***29 U.S.C. § 2160(b) (1982)* Complaint and notice of hearing; answer; court rules of evidence inapplicable**

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The

person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28.

STATEMENT OF THE CASE

Petitioners brought this action pursuant to section 301 of the Labor-Management Relations Act, 1947, *codified as* 29 U.S.C. § 185 (1982). The District Court granted summary judgment in favor of respondent G-K Trucking on the basis of the relevant statute of limitations, *see* App. C8, and the Court of Appeals for the Ninth Circuit affirmed that decision, *see* 802 F.2d at 1193, App. A6. Because the reasoning of the Court of Appeals is in direct and irreconcilable conflict with a recent decision of this Court, *West v. Conrail*, No. 85-1804 (U.S. Apr. 6, 1987), its judgment must be vacated and the case remanded for further consideration in light of *West*.

Petitioners are sixteen former employees of respondent G-K Trucking, who were employed at its Montebello, California terminal. Petitioners claim that G-K Trucking violated the terms of certain labor agreements and riders to those agreements governing plant closures and the laying off of employees. The February 2, 1981 rider (commonly referred to as the "Concessions Rider") gave G-K Trucking the right to maintain a separate terminal which paid lower wages, required G-K Trucking to keep the Montebello terminal open, and allowed G-K Trucking to provide work through the second terminal only if all Montebello terminal employees were working. The July 27, 1981 rider (commonly referred to as the "Systems 99 Rider") provided that G-K Trucking would not reduce the number of employees at the Montebello terminal absent economic necessity. In October and November of 1981, G-K Trucking laid off eleven employees at the Montebello terminal. The union thereupon filed a grievance on behalf of these employees, which was decided in favor of G-K Trucking on November 10, 1982. In March of 1982, the Montebello terminal employees were approached by G-K Trucking for further concessions, which they refused. The Montebello terminal then was closed on April 16, 1982, and the remaining petitioners were laid off permanently at that time. No grievance regarding the closing of the Montebello terminal ever was filed. *See* 802 F.2d at 1191, App. A4.

Petitioners filed their complaint initiating this action on December 3, 1982. 802 F.2d at 1191-92, App. A5. After some discovery had been had, the district court entered summary judgment for respondents, App. D2, holding that the action was barred by the applicable

six-month statute of limitations, App. C8. The Court of Appeals then affirmed. *See* 802 F.2d at 1193, App. A10.

Both the district court, *see* App. C6-C7, and the Court of Appeals, *see* 802 F.2d at 1191, App. A5, retroactively applied *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 155 (1983), and held the six-month statute of limitations embodied in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1982), to be controlling. Consequently, the Court of Appeals concluded that the action was time barred if it accrued prior to June 3, 1982. *See* 802 F.2d at 1191-92, App. A5-A6. Applying a prior Ninth Circuit precedent teaching that under the circumstances the cause of action accrued when the employees learned or should have learned that the union had decided not to file a grievance, the Court of Appeals then affirmed "the district court's conclusion that, on or before June 3, 1982, as a matter of law, [petitioners] knew or should have known of the Union's decision not to pursue a grievance regarding the Montebello terminal closing." *Id.* at 1192, App. A6.[1]

Petitioners had argued, however, that an earlier complaint received and returned by the district court clerk on November 10, 1982 effectively "was 'filed' for statute of limitations purposes". *Id.* at 1192 n. 2. This result follows from another Ninth Circuit precedent,

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[1] More precisely, the District Court ruled that the petitioners had this knowledge "by the end of May, 1982." *See* App. C5. This difference of a few days is not material to the disposition of this case, however.

Loya v. Desert Sands Unified School District, 721 F.2d 279 (9th Cir. 1983), holding that "a complaint which arrives in the custody of the clerk within the statutory period but fails to conform with formal requirements in local rules" should be regarded as filed, *id.* at 281.

But the Court of Appeals rejected this argument, holding that "a section 301 action must be filed *and served* within the six-month limitations period". 802 F.2d at 1192 n.2, App. A6 (emphasis in the original). Hence, the Court of Appeals concluded that "[b]ecause the November 10 complaint was never served, it does not mark the date of the filing for purposes of the statute of limitations". *Id.*

The entire edifice of reasoning upon which the judgment of the Court of Appeals rests thus turns upon whether or not the complaint in a section 301 action must be served, as well as filed, within the six-month limitations period. If not, then "for purposes of the statute of limitations" the complaint must be regarded as filed on November 10, 1982. *Loya*, 721 F.2d at 281. In that case, the summary judgment in favor of respondents can be upheld only if as a matter of law petitioners knew or should have known prior to May 10, 1982 of the union's decision not to grieve the Montebello closing.

But the primary evidence relied upon implicitly by the District Court, *see* App. C-5, and explicitly by the Court of Appeals, *see* 802 F.2d at 1192, App. A6-A7, regarding the petitioners' knowledge of the union's intent is a letter dated May 17, 1982 to the union steward, which was only subsequently communicated to some of the petitioners, *see id.* The only other evidence even mentioned by the Court of Appeals is the

deposition testimony of some of the plaintiffs that "sometime" between the date of the terminal closing and an unspecified date "early in May of 1982" they either became aware or suspected that the union would take no action. *See id.*[2]

The issue of whether service of the complaint is necessary in order to comply with the requirements of the statute of limitations in a section 301 action is thus dispositive in this case. Only if the record supports the conclusion that as a matter of law the petitioners knew or should have known by May 10, 1982 that the union intended to take no action on their behalf, a position not even hinted at by the Court of Appeals and not taken by the District Court, can the judgment otherwise stand. Thus, if the Court of Appeals erred as to the necessity of service, its judgment must be vacated and the case remanded to it for further consideration.

REASONS FOR GRANTING THE WRIT

The Decision Of The Court Of Appeals Is In Direct And Obvious Conflict With A Recent Decision Of This Court, *West v. Conrail*, No. 85-1804 (U.S. Apr. 6, 1987).

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[2] Although the District Court found that as of April, 1982 most of the petitioners *believed* that the union would take no action, it went on to rule that they knew or should have known of this fact only "by the end of May, 1982." App. C5. But since the grant of summary judgement is reviewed by the Court of Appeals de novo, *see* 802 F.2d at 1191, App. A5, these somewhat contradictory factual findings have no significance other than as an aid to that court's comprehension of the basis for the ruling of the trial court.

The Court of Appeals for the Ninth Circuit squarely held in its opinion in this case that "a section 301 action must be filed *and served* within the six-month limitation period". 802 F.2d at 1192 n. 2., App. A6 (emphasis in the original); *see also Gallon v. Levin Metals Corp.*, 779 F.2d 1439, 1441 (9th Cir. 1986) ("six-month service requirement" adopted) *petition for certiorari filed*, 54 U.S.L.W. 3763 (U.S. May 7, 1986) (No. 85-1839). Just this month, however, this Court expressly ruled to the contrary. *West v. Conrail*, No. 85-1804, slip op. at 5 (U.S. Apr. 6, 1987).

Previously, this Court had ruled that the six-month statute of limitations embodied in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1982), should govern hybrid actions brought pursuant to section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 (1982). *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 155 (1983). But the holding of *DelCostello* was not intended to require that any part of the Federal Rules of Civil Procedure, including Rule 4(j) governing the period within which service must be made, be superseded by any part of the National Labor Relations Act. *West*, slip op. at 5. Therefore, a hybrid section 301 action "is not barred if it has been 'commenced' in compliance with [Fed. R. Civ. P.] 3 within" the six-month period mandated by *DelCostello*. *West*, slip op. at 6; *see also id.* at 4 n.2 (equating Labor-Management Relations Act with Railway Labor Act at issue in *West* for purposes of this issue).

Hence, the Court of Appeals unquestionably "has decided an important question of federal law . . . in a way in conflict with applicable decisions of this

Court". Sup. Ct. R. 17.1(c). Accordingly, the writ of certiorari should be granted.

Where, as here, the Court of Appeals decision predates the conflicting decision of this Court, vacation of the judgment below and remand to the Court of Appeals for reconsideration in light of the recent decision has been the practice normally followed by the Court. *See, e.g., Lash v. Aikens*, 425 U.S. 947 (1976); *Kirwin v. Romano*, 425 U.S. 929 (1976); *Mathews v. Williams*, 424 U.S. 941 (1976). Inasmuch as the force of *West* seems so compelling that the Court of Appeals may well rule in petitioners' favor and thus obviate any need for further consideration of this action by this Court or at least substantially revise its reasoning and thus alter the context of the issues presented, this procedure would seem to be particularly appropriate. For this reason, should the petition for a writ of certiorari be granted, petitioners expressly request that the judgment below be vacated and the case remanded for further consideration in light of *West*.

CONCLUSION

Because the opinion of the Court of Appeals for the Ninth Circuit is irreconcilably in conflict with a recent opinion of this Court on an issue of law that is decisive as to the outcome of the case, this petition for certiorari should be granted. If in fact the petition is granted, the judgment of the Court of Appeals should be vacated and the matter remanded to it for further consideration in light of *West v. Conrail*, No. 85-1804 (U.S. Apr. 6, 1987).

Dated:April 23, 1987

Respectfully submitted,

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APPENDIX A

Francis LACINA, David Galbraith, Bill Knight, George Craig, Ted Edwards, Charles Beeson, Donald Evans, Robert Beck, Lou Resinger, Andrew Rogers, Buck Germany, Dan Kelley, Marvin Gates, Wilburt Bond, William Gonzales, Lester Dixon, Frank Matney, and Rick Bernas, Plaintiffs-Appellants,

and

Petersen & Ferguson, Appellant,

v.

G-K TRUCKING; General Cable; Penn-Central Corp.; G-K Technologies; Eastern Carriers; and Robert Jensen, Defendants-Appellees.

No. 85-5728.

United States Court of Appeals,
Ninth Circuit.
Argued and Submitted May 8, 1986.
Decided Oct. 21, 1986.
As Amended Dec. 30, 1986.

Employees brought action under Labor Management Relations Act claiming that employer violated terms of collective bargaining agreement in closing facility. The United States District Court for the Central District of California, James M. Ideman, J., entered summary judgment in favor of employer and imposed sanction against counsel for employees for Rule 11 violation, and employees and counsel appealed. The Court of Appeals, Cynthia Holcomb Hall, Circuit Judge, held that: (1) employees' action was barred by six-month statute of limitations for unfair labor practices under

National Labor Relations Act, and (2) counsel did not violate Rule 11.

Affirmed in part, reversed in part.

1. Limitation of Actions *95(1)

Employees knew or should have known more than six months before action was filed that union was not going to pursue grievance regarding employer's closing of facility and, thus, employee's cause of action under Labor Management Relations Act for violation of collective bargaining contract was barred by six-month statute of limitations for unfair labor practices under National Labor Relations Act. National Labor Relations Act, § 10(b), as amended, 29 U.S.C.A. § 160(b); Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

2. Federal Civil Procedure *2721

Subjective bad faith is not element of Rule 11 violation; it is enough if paper at issue, signed by attorney, lacks basis in fact or good-faith argument in law, or needlessly increases litigation. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

3. Federal Civil Procedure *2721

Counsel for employees bringing action under Labor Management Relations Act for breach of collective bargaining agreement, did not violate Rule 11 in filing supplemental authority in opposition to defendant's motion for reconsideration, though action was dismissed as time barred, in that earlier filed and rejected complaint attached as exhibit to previous papers in opposition to defendant's motion to reconsider, provided factual basis for counsel's argument, counsel's proposition that rejected complaint constituted filing for statute of limitations purposes was good-faith legal argument at time supplemental

authority was filed, and there was no misstatement of fact which increased cost of litigation to opposing party. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.; National Labor Relations Act, § 10(b), as amended, 29 U.S.C.A. § 160(b); Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

Peter J. Ferguson, Santa Ana, Cal., for plaintiffs-appellants.

David Cathcart, Newport Beach, Cal., for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before KENNEDY, BEEZER and HALL, Circuit Judges.

CYNTHIA HOLCOMB HALL, Circuit Judge:

Plaintiffs-appellants, employees of GK Trucking, appeal from the district court's award of summary judgment in favor of defendant-appellee GK Trucking. Plaintiffs' counsel, Peterson & Ferguson, appeals from the imposition of a $1,000 sanction. We affirm the grant of summary judgment and reverse the $1,000 sanction imposed on counsel.

I

Plaintiffs brought this action under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (section 301). Plaintiffs claim that GK Trucking violated the terms of the 1979-82 National Master Freight Agreement and two riders to the agreement by closing its Montebello, California terminal. The

February 2, 1981 "Concessions Rider" gave GK Trucking the right to maintain a separate terminal which paid lower wages, required GK Trucking to keep the Montebello terminal open, and allowed GK Trucking to provide work through the second terminal only if all Montebello terminal employees were working. The July 27, 1981 "Systems 99 Rider" provided that GK Trucking would not reduce the number of employees at the Montebello terminal absent economic necessity.

In October and November of 1981, GK Trucking laid off eleven employees at the Montebello terminal. The union thereupon filed a grievance on behalf of these employees. In March of 1982, the Montebello terminal employees refused further concessions, and the Montebello facility was closed on April 16, 1982. No grievance regarding the closing of the Montebello terminal was filed. On November 10, 1982, the grievance of the eleven laid-off employees was decided in favor of GK Trucking.

In this action, the district court granted summary judgment in favor of GK Trucking on the basis of the relevant statute of limitations, finding that plaintiffs knew or should have known, on or before June 3, 1982, that the union was not going to proceed with a grievance in regard to the Montebello closing. The district court also imposed a $1,000 sanction on plaintiffs' counsel, finding that he violated Fed.R.Civ.P. 11.

II

[1] We review the district court's grant of summary judgment *de novo*, *Gallon v. Levin Metals Corp.*, 779 F.2d 1439, 1440 (9th Cir. 1986), and affirm.

The six-month statute of limitations for unfair labor practices contained in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), applies in section 301 actions. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 169-71, 103 S.Ct. 2281, 2293-94, 76 L.Ed.2d 476 (1983).[1] Plaintiffs' cause of action was filed December 3, 1983,[2] so we must determine

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[1] Petitioners argue that retroactive application of *Del Costello* is unwarranted in this case. But petitioners correctly state that retroactive application of *Del Costello* is proper when it lengthens the period for filing. *See, e.g., Kelley v. International Brotherhood of Elec. Workers*, 803 F.2d 516, 518 (9th Cir. 1986); *Aragon v. Federated Dep't Stores, Inc.*, 750 F.2d 1447, 1451 (9th Cir. 1986); *Glover v. United Grocers, Inc.*, 746 F.2d 1380, 1382 (9th Cir. 1984); *Edwards v. Teamsters Local Union No. 36*, 719 F.2d 1036, 1040 (9th Cir. 1983), *cert. denied*, 465 U.S. 1102, 104 S.Ct. 1599, 80 L.Ed.2d 130 (1984). *See also Acri v. International Assoc. of Machinists & Aerospace Workers District Lodge 115*, 781 F.2d 1393, 1396 (9th Cir. 1986); *McNaughton v. Dillingham Corp.*, 722 F.2d 1459, 1460-62 (9th Cir. 1984) (*McNaughton II*) (denying petition for rehearing). This is precisely what happened in this case: The period was *lengthened*, from 100 days (under state law as mandated by *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981) to six months. Petitioners arguments against retroactive application of *Del Costello* are thus without merit.

[2] A law clerk for plaintiffs' counsel mistakenly filed a complaint on behalf of plaintiffs on November 10, 1982. The complaint was received and returned by the district court, but never served on defendants. Relying on this court's decision in *Loya v. Desert Sands Unified School District*, 721 F.2d 279, 281 (9th Cir. 1983), plaintiffs argue that the filed and rejected complaint was "filed" for statute of limitation purposes. We have since held, however,

whether plaintiffs' [sic] on or before June 3, 1982.

A section 301 cause of action for failure to pursue a grievance accrues when the plaintiff knew or should have known that the union was not going to pursue a grievance on his behalf. *Galindo v. Stoody Co.*, 793 F.2d 1502, 1509 (9th Cir. 1985). We agree with the district court's conclusion that, on or before June 3, 1982, as a matter of law, plaintiffs knew or should have known of the union's decision not to pursue a grievance regarding the Montebello terminal closing.

By letter dated May 17, 1982, the union informed Walter Bache, the union steward for the Montebello terminal, as follows:

> This is in reply to your letter regarding negotiations and closure of the G-K Trucking operation.
>
> This Local Union held two meeting [sic] with the drivers and submitted the Company's final proposal. Both times the proposal was voted down by the drivers.
>
> The Company put in for a change of operations to close down their trucking operation. This was heard and approved by the Change of Operations Committee at the Joint Western Area Committee hearings held in San Diego last week.

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that a section 301 action must be filed *and served* within the six-month limitations period. *Gallon v. Levin Metals Corp.*, 779 F.2d 1439, 1440-41 (9th Cir. 1986), *petition for cert. filed*, 54 U.S.L.W. 3763 (U.S. May 7, 1986) (No. 85-1839). Because the November 10 complaint was never served, it does not mark the date of the filing of plaintiffs' action for purposes of the statute of limitations.

> We reminded the Company they are still bound by the Agreement until its expiration date, and should any trucking operation be resumed, our contract will apply.
>
> We are very sorry that nothing could be done to save the jobs of our members, but as I stated above, the proposals were voted down, and the Company simply would not reconsider.

Bache testified at his deposition that he contacted some plaintiffs regarding the contents of the May 17 letter, and informed others of the letter when they contacted him. In the context of information available at that time and the lack of union action prior to the letter, the letter was strong evidence that the union was not going to take further action regarding the Montebello terminal closing.

Several plaintiffs testified at depositions that, sometime between the Montebello terminal closing on April 16, 1982 and early in May of 1982, they became aware that the union would not file a grievance on their behalf in regard to the closing. Others testified that they were not sure whether the union was going to pursue a grievance or not, or that they "believed" the union was not going to take any action.

Under these circumstances, even if some of the plaintiffs lacked actual knowledge that the union was not going to file a grievance over the Montebello terminal closing, the district court correctly found that all plaintiffs knew or should have known, on or before June 3, 1982, that no union action was forthcoming.[3]

---

[3] The grievance proceeding concerning the eleven laid-off employees does not affect accrual in this case because that

See Galindo, 793 F.2d at 1509. *See also Metz v. Tootsie Roll Industries, Inc.*, 715 F.2d 299, 304 (7th Cir. 1983) (considering what reasonably diligent plaintiff would have discovered in determining accrual date), *cert. denied*, 464 U.S. 1070, 104 S.Ct. 976, 79 L.Ed.2d 214 (1984).

III

[2] Because the facts which caused the district court to impose sanctions are not in dispute, we review the district court's conclusion that plaintiffs' counsel violated Fed.R.Civ.P. 11 *de novo*, *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986), and reverse.

Rull 11 provides in pertinent part:

> The signature of an attorney [on a pleading, motion, or other paper] . . . constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

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proceeding did not concern the closing of the Montebello terminal. *See Galindo*, 793 F.2d at 1510 n.5. The layoffs at issue took place in October and November of 1981, and the grievance was filed on December 9, 1981. Although the grievance sought "continuing relief," this cannot reasonably be construed to include claims in regard to the closing the Montebello terminal on April 16, 1982.

Subjective bad faith is not an element of a Rule 11 violation, it is enough if the paper at issue lacks a basis in fact or a good faith argument in law, or needlessly increases litigation. *Zaldivar*, 780 F.2d at 830-32.

[3] Plaintiffs' counsel did not violate Rule 11 in filing the February 11, 1985 Supplemental Authority in Opposition to Defendant's Motion for Reconsideration. First, the November 10 filed and rejected complaint, attached as an exhibit to previous papers in opposition to defendants' motion to reconsider, provides the factual basis for counsel's argument. In the Supplemental Authority, plaintiffs' counsel specifically referred to the previous declaration of counsel, the rejected complaint, and their location in the record.

Second, plaintiffs' reliance on *Loya*, 721 F.2d at 281, for the proposition that the rejected November 10 complaint constituted a filing for statute of limitations purposes was then a good faith legal argument. At the time plaintiffs' Supplemental Authority was filed, we had not yet held that a section 301 complaint must be filed and served within the six-month limitations period. *See Gallon*, 779 F.2d at 1440-41.

Third, although the district court was initially confused by the November 10 date in the Supplemental Authority, the matter was cleared up at oral argument. Thus, this is not a case in which a misstatement of fact has increased the costs of litigation to the opposing party. *See, e.g., In re National Student Marketing Litigation*, 78 F.R.D. 726, 731 & n. 13 (D.D.C. 1978), *aff'd sub nom. Lipsig v. National Student Marketing Corp.*, 663 F.2d 178 (D.C.Cir. 1980). Moreover, there is no indication that the Supplemental Authority was filed for an improper purpose.

IV

We therefore affirm the district court's grant of summary judgement in favor of GK Trucking but reverse the district court's imposition of sanctions against plaintiffs' counsel. All parties are to bear their own costs of appeal.

AFFIRMED IN PART, REVERSED IN PART.

JAN 26 7

FILED

JAN 26 1987

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCIS LACINA, DAVID GALBRAITH, BILL KNIGHT, GEORGE CRAIG, TED EDWARDS, CHARLES BEESON, DONALD EVANS, ROBERT BECK, LOU RESINGER, ANDREW ROGERS, BUCK GERMANY, DAN KELLEY, MARVIN GATES, WILBURT BOND, WILLIAM GONZALES, LESTER DIXON, FRANK MATNEY, and RICK BERNAS,

Plaintiffs-Appellants,

and

PETERSEN & FERGUSON,

Appellant,

v.

G-K TRUCKING; GENERAL CABLE; PENN-CENTRAL CORP.; G-K TECHNOLOGIES; EASTERN CARRIERS; and ROBERT JENSEN,

Defendants-Appellees.

No. 85-5728
D.C. No. CV 82-6272-JMI

ORDER

Before: KENNEDY, BEEZER, and HALL, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge requested a vote on it. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FILED
FEB 25 4 25 PM '85
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CAL. F.
BY DEPUTY

APPENDIX C

ENTERED
FEB 26 1985
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FRANCIS LACINA, et al.,	**CASE NO. CV 82-6272 JMI**
Plaintiffs,	
v.	**STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW**
GK TRUCKING, et al.,	
Defendants.	

Pursuant to Local Rule 7.14.2., Defendants GK Trucking Corp., GK Technologies, Incorporated, including its division General Cable Company, The Penn Central Corporation and Robert Jensen submit to the Court their proposed Statement of Uncontroverted Facts and Conclusions of Law with respect to their Motion for Summary Judgment. Said Defendants contend that there are no genuine issues as to any of the proposed uncontroverted facts, and that all such facts are material.

1. GK Trucking Corp., (hereinafter "GK Trucking") was a contract carrier truck line. GK Trucking is a subsidiary of GK Technologies, Inc., which is a subsidiary of Pennsylvania Company, which

in turn is a subsidiary of The Penn Central Corporation. General Cable is a division of GK Technologies, Inc., and was the largest single customer of GK Trucking. Defendant Robert Jensen was the Chairman of the Board of GK Technologies, Inc.

2. Plaintiffs Francis Lacina, David Galbraith, Bill Knight, George Craig, Ted Edwards, Charles Beeson, Donald Evans, Robert Beck, Lou Resinger, Andrew Rogers, Buck Germany, Dan Kelly, Marvin Gates, Wilburt Bond, William Gonzales, Lester Dixon, Frank Matney and Rick Bernas were truck drivers employed by GK Trucking at its Montebello, California, terminal.

3. In 1979, GK Trucking and The International Brotherhood of Teamsters Union, Local 224 (hereinafter "the Union"), entered into a collective bargaining agreement governing the terms and conditions of employment of GK Trucking's employees (including the plaintiffs) at the Montebello, California, terminal. Said collective bargaining agreement consisted of the National Master Freight Agreement, the Western States Area Over The Road Supplemental Agreement and an August, 1979, rider. When entered into in 1979, this collective bargaining agreement was scheduled to run through June 30, 1982.

4. During late 1980, it became clear to the management of GK Trucking that it needed to reduce the wages being paid to its drivers if it was to remain competitive with other carriers, both union and non-union.

5. On February 9, 1981, after several months of negotiations, GK Trucking and the Union entered into a rider to the collective bargaining agreement covering

the 33 drivers then employed at the Montebello terminal. In this rider (known as the "concessions rider") which was approved by the drivers, the Union agreed to various concessions in the existing labor agreement and also agreed to enter into a second rider — the "system 99 rider" — for the purpose of allowing GK Trucking to open a second West Coast terminal for different freight.

6. The system 99 rider was signed by the Union and GK Trucking on July 27, 1981.

7. The 1979-1982 collective bargaining agreement between GK Trucking and the Union contained a mandatory, final and binding grievance and arbitration procedure for disputes that arose under the agreement. Article 8, Section 1, of the National Master Freight Agreement provides in pertinent part as follows:

> "All grievances or questions of interpretation arising under this master agreement or supplemental agreements thereto shall be processed as set forth below.
>
> * * *
>
> (a) All factual grievances or questions of interpretation arising under the provisions of the supplemental agreement (or factual grievances arising under the National Master Agreement) shall be processed in accordance with the grievance procedure of the applicable supplemental agreement."

8. Article 45 of the Western States Area Over The Road Motor Freight Supplemental Agreement sets forth a detailed grievance and arbitration procedure and states: "The decision of the umpire shall be final

and binding on all parties and the employee(s) involved."

9. None of the riders negotiated by the Union and GK Trucking modified the grievance or arbitration language contained in either the National Master Freight Agreement or the Western States Area Over The Road Motor Freight Supplemental Agreement.

10. In November of 1981, GK Trucking laid off 10 drivers, 5 of whom are plaintiffs herein, as a result of a reduction in work.

11. In late March, 1982, GK Trucking and the Union negotiated an entirely new labor agreement to replace the expiring National Master Freight Agreement. It was designed to enable GK Trucking to become more competitive. This agreement was put to a vote by GK Trucking's drivers and was rejected.

12. After the rejection of the new labor agreement, GK Trucking, on or about April 1, 1982, announced to its employees that it was going out of business, closing the Montebello terminal and laying them off penently.

13. As of April 16, 1982, the Montebello terminal was closed and all of the drivers, including all 18 plaintiffs herein, were laid off permanently.

14. On or about May 17, 1982, the Union and GK Trucking formalized the closure of the Montebello terminal in a change of operations hearing conducted in San Diego, California, pursuant to Article 8, Section 6, of the National Master Freight Agreement.

15. Neither the Union, any plaintiff, nor any other person filed a grievance with respect to the close of the Montebello terminal and the permanent lay-off of the GK Trucking drivers in April, 1982.

16. On or about May 18, 1982, former GK Trucking driver and union steward Walter Bache was informed by Union officials that the Union did not intend to take any action, including the filing of a grievance, to keep the Montebello terminal open.

17. As of April, 1982, most, if not all, of the plaintiffs believed that the Union was not going to take any action, including filing a grievance, regarding the closing of the Montebello terminal and their permanent lay-offs. Further, as of this month, most, if not all, of the plaintiffs believed that the Union was not representing them fairly.

18. All other plaintiffs knew no later than May, 1982, after the change of operations hearing, that the Union was not going to take any action to keep the Montebello terminal open.

19. All of the plaintiffs knew or should have known by the end of May, 1982, that the Union was not going to take any action, including filing a grievance, regarding the close of the Montebello terminal or their loss of jobs.

20. The proposal to close GK Trucking's Montebello terminal and discontinue operations was made by GK Trucking Vice President Stephen Breckley and GK Technologies, Inc., Vice President Larry Morris.

21. Neither The Penn Central Corporation nor Robert Jensen had any role whatsoever in the negotiation of the collective bargaining agreement or the two 1981 riders.

CONCLUSIONS OF LAW

Insofar as they may be mixed questions of fact and law, the following conclusions are also found by the Court to be true in all respects.

1. This is an action for a breach of a collective bargaining agreement between an employer in an industry affecting commerce and a union representing employees who are working in an industry affecting interstate commerce. The Court has jurisdiction pursuant to Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. Section 185(a).

2. Under federal law, aggrieved employees may not state a claim for relief for breach of a collective bargaining agreement unless they exhaust mandatory, binding, final grievance and arbitration procedures in the agreement. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563, (1976).

3. Employees are relieved of this exhaustion requirement if their union has breached its duty of fair representation toward them in processing their grievances. *Vaca v. Sipes*, 386 U.S. 171 (1967).

4. Because the plaintiffs have not exhausted the grievance and arbitration procedures available to them under the collective bargaining agreement between GK Trucking and the Union, in order to succeed in this Section 301 action, they must first demonstrate that the Union breached its duty of fair representation, and then establish that GK Trucking breached the collective bargaining agreement. *Hines v. Anchor Motor Freight, Inc., supra; United Parcel Service, Inc. v. Mitchell*, 451 U.S.

5. In *DelCostello v. Teamsters*, ___ U.S. ___, 103 S.Ct. 2281, 76 L.Ed. 476 (1983), the Supreme Court

held that a six-month statute of limitation applies to suits brought against an employer and a union for breach of the collective bargaining agreement and breach of duty of fair representation.

6. The six-month statute of limitation applies to cases involving grievances which result in an arbitration award and to cases in which grievances could be filed, but are not. *McNaughton v. Dillingham Corp.*, 707 F.2d 1042, 1046 (9th Cir. 1983); *Barina v. Gulf Trading & Transp. Co.*, 726 F.2d 560, 561 n. 1 (9th Cir. 1984); *Bigbie v. Local 142, International Brotherhood of Teamsters*, 530 F. Supp. 402 (N.D. Ill. 1981).

7. The six-month statute of limitation enunciated by the Supreme Court in *DelCostello* is retroactive in those cases in which that limitation period would lengthen the time to bring suit rather than shorten it. *Barina v. Gulf Trading and Transportation Co.*, 726 F.2d 560, 564, n. 8 (9th Cir. 1984). In the case at hand, the statute of limitations in a Section 301 action brought against an employer in California after 1981 but before 1983 was 100 days pursuant to *United Parcel Service, Inc. v. Mitchell, supra*, and Section 1288 of the California Code of Civil Procedure. See *Aragon v. Federated Dept. Stores, Inc.*, ___ F.2d ___, 85 Daily Journal D.A.R. 229 (9th Cir. 1985)

8. In cases where no grievance is filed, the six-month statute of limitation period begins to run "when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged [violation]." *Hungerford v. United States*, 307 F.2d 99, 102 (9th Cir. 1962); *NLRA v. Don Burgess Construction Corp.*, 596 F.2d 378 (9th Cir.), *cert. denied*, 444 U.S. 940 (1979); *Metz v. Tootsie Roll Industries*, 715

F.2d 299 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 976 (1984).

9. In the case at hand, all of the plaintiffs knew or should have known by April, 1982, or no later than May, 1982, that the Union was not going to take any action, including the filing of a grievance, to keep the Montebello terminal open or to oppose their permanent lay-offs. Because the complaint in the instant lawsuit was filed on December 3, 1982 — more than six months after the plaintiffs held these beliefs — their Section 301 action against the defendants is barred by the six month statute of limitations.

10. Plaintiffs' purported second claim for relief, alleging that the termination of their employment was undertaken "for the purpose of discouraging the plaintiffs' membership in a labor organization in violation of Section 7 and 8(a) of the NLRA (National Labor Relations Act)", involves an alleged unfair labor practice under Section 7 and 8 of the NLRA and is therefore preempted by federal labor law. *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.) *cert. denied*, 439 U.S. 930 (1978); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Plaintiffs' second claim for relief, allegating that their terminations were based on discouraging membership in a labor organization, is therefore subject to dismissal since it is preempted. *Farmer v. Carpenters*, 430 U.S. 290, 305, (1977).

11. All claims against Defendants Penn Central Corporation and Robert Jensen should be dismissed since there is no evidence of their participation in any of the alleged wrongful acts.

12. There are no genuine issues covering any of the foregoing facts, and all such facts are material.

13. Judgment shall be entered in accordance with the proposed summary judgment submitted herewith.
DATED: 25 Feb. 85

JAMES M. IDEMAN
United States District Judge

APPENDIX D

J5-6
FILED
Feb 25 1985
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY
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Feb 15 11 32 AM '85

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FRANCIS LACINA, et al., *Plaintiffs,* v. **GK TRUCKING, et al.,** *Defendants.*	**CASE NO. CV 82-6272 JMI (Bx)** **JUDGMENT**

ENTERED
FEB 26 1985
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

Defendants GK Trucking Corp., GK Technologies, Incorporated, including its division General Cable Company, The Penn Central Corporation and Robert Jensen's motions for reconsideration and summary judgment came on for hearing on February 11, 1985

26 FEB 1985

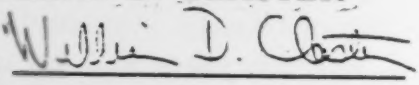
before the Court, the Honorable James M. Ideman, United States District Judge, presiding. On the same date, plaintiffs' motion for summary judgment was heard. The Court, having considered all matters and evidence submitted in support of and in opposition to the motions, and the issues having been duly heard and a decision duly rendered and in accordance with the findings of fact and conclusions of law herewith:

IT IS ORDERED AND AJUDGED that defendants GK Trucking Corp., GK Technologies, Incorporated, including its division General Cable Company, The Penn Central Corporation and Robert Jensen's motions br granted, that plaintiffs' motion for summary judgment be denied, that Case No. CV-82-6272 JMI (Bx) be dismissed as to said defendants, that plaintiffs take nothing by way of their first amended complaint, that said defendants be awarded their costs of suit, and that, pursuant to Federal Rule of Civil Procedure 11, plaintiffs' counsel shall pay to defendants, by 5:00 p.m. on February 25, 1985, the sum of $1,000.

Dated: February 22, 1985

UNITED STATES DISTRICT JUDGE

Submitted by:
GIBSON, DUNN & CRUTCHER
DAVID A. CATHCART
WILLIAM D. CLASTER

BY: 

Attorneys for Defendants
GK TRUCKING CORP.; GK TECHNOLOGIES, INCORPORATED, including its division GENERAL CABLE COMPANY; THE PENN CENTRAL CORPORATION; and ROBERT JENSEN

PROOF OF SERVICE BY MAIL

I, Victoria A. Robinson,

I am a citizen of the United States and am employed in the County of Orange, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 800 Newport Center Drive, Suite 600, Newport Beach, California 92660, in said County and State; on the 14th day of February, 1985, I served the within

ORDER

on the following by placing a true copy thereof in an envelope addressed as follows:

Gregory G. Petersen, Esq.
Petersen & Ferguson
600 West Santa Ana Boulevard
P.O. Box 700
Santa Ana, CA 92701

and then sealing said envelope and deposition the same, with postage thereon fully prepaid, in the mail at Newport Beach, California; that there is regular communication between the place of mailing and the place so addressed.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on February 14, 1985, at Newport Beach, California.

Victoria A. Robinson

Victoria A. Robinson

PROOF OF SERVICE BY MAIL

State of California

ss.

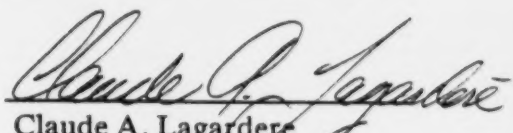
County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Los Angeles, California 90025; that on April 23, 1987, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Original + 40 Copies)

William D. Claster, Esq.
Gibson, Dunn & Crutcher
800 Newport Center Drive
Suite 700
Newport Beach, CA 92660
(3 Copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 23, 1987, at Los Angeles, California.



Claude A. Lagardere
(Original signed)

Supreme Court, U.S.
FILED
MAY 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1738

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FRANCIS LACINA, DAVID GALBRAITH, BILL KNIGHT, GEORGE CRAIG, TED EDWARDS, CHARLES BEESON, DONALD EVANS, ROBERT BECK, LOU RESINGER, ANDREW ROGERS, BUCK GERMANY, DAN KELLY, MARVIN GATES, WILBURT BOND, WILLIAM GONZALES, LESTER DIXON, FRANK MATNEY and RICK BERNAS,
Petitioners,

vs.

G-K TRUCKING, GENERAL CABLE, PENN-CENTRAL CORP., G-K TECHNOLOGIES, EASTERN CARRIERS and ROBERT JENSEN,
Respondents.

ON PETITION
FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID A. CATHCART
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Attorneys for Respondents
**Counsel of Record*

Lawyers Brief Service / Legal Publishers / (213) 383-4457 / (714) 720-1510

QUESTION PRESENTED

Is the six-month statute of limitations for actions brought pursuant to Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), satisfied by a mistaken, unsuccessful attempt to file a complaint?

LIST OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

A list of parent companies, subsidiaries and affiliates of respondents GK Trucking Corp., General Cable, Penn Central Corporation and GK Technologies, Incorporated is attached hereto as Appendix "A".

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No. 86-1738

IN THE

Supreme Court of the United States

October Term 1986

FRANCIS LACINA, DAVID GALBRAITH, BILL KNIGHT, GEORGE CRAIG, TED EDWARDS, CHARLES BEESON, DONALD EVANS, ROBERT BECK, LOU RESINGER, ANDREW ROGERS, BUCK GERMANY, DAN KELLY, MARVIN GATES, WILBURT BOND, WILLIAM GONZALES, LESTER DIXON, FRANK MATNEY and RICK BERNAS,
Petitioners,

vs.

G-K TRUCKING, GENERAL CABLE, PENN-CENTRAL CORP., G-K TECHNOLOGIES, EASTERN CARRIERS and ROBERT JENSEN,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The petition for certiorari attempts to escape a routine application of *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), by misapplying *West v. Conrail*, No. 85-1804 (U.S. April 6, 1987), to dictum

contained in a footnote in the Ninth Circuit opinion in the present case. Certiorari would serve no useful or appropriate purpose and should be denied.

The district court granted summary judgment in favor of respondents on the ground that petitioners' action under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, is barred by the six-month statute of limitations applicable to such actions. That decision was affirmed by the Court of Appeals for the Ninth Circuit. 802 F.2d 1190 (9th Cir. 1986).

Significantly, the Court of Appeals' opinion deals almost exclusively with the issue of when the statute of limitations with respect to the Section 301 complaint *commenced* running. The Ninth Circuit held that the district court correctly decided that the petitioners knew or should have known that the statute of limitations began running more than six months before their complaint was filed. Almost as an afterthought, the Court of Appeals pointed out in a footnote that an earlier, futile attempt to file a complaint did not satisfy the statute of limitations since that complaint was neither filed nor served in a timely manner.

Petitioners now seek to overturn the Ninth Circuit's decision by promoting this passing statement in a footnote to an issue worthy of certiorari. According to petitioners, the question before this Court is whether the rulings below are in conflict with this Court's recent decision in *West v. Conrail*, No. 85-1804 (U.S. April 6, 1987). In *West*, the Court held that a timely-filed Section 301 complaint need not also be served within six months in order to satisfy the statute of limitations.

In the present case, *the complaint was neither filed nor served* within the applicable six-month limitation period. Petitioners mistakenly attempted to file a complaint on a date arguably before the expiration of the limitation period, but it was rejected by the district court clerk for failing to

comply with the Federal Rules of Civil Procedure. On petitioners' second attempt, the complaint was filed, but that filing was indisputably outside the six-month limitation period. The district court held that the aborted first attempt to file did not satisfy the statute of limitations, and the Ninth Circuit affirmed.

Thus, petitioners' basic assumption — that this case presents the identical question resolved by the Court in *West* — is inaccurate. Here, unlike *West*, the complaint before the district court and the Ninth Circuit was itself untimely filed. There is thus no question of applying *West* to forgive untimely service of a complaint which was timely filed. The decision of the Court of Appeals is not in conflict with *West*, and does not depend on the rationale *West* rejected, but instead involves unique circumstances which are not likely ever to be repeated and which plainly do not warrant granting certiorari.

REASONS FOR DENYING THE WRIT

Petitioners assert that the Court's recent decision in *West v. Conrail*, No. 85-1804 (U.S. April 6, 1987), undermines the reasoning upon which the judgment of the Court of Appeals rests, and requires that that judgment be vacated and the case remanded for further consideration. They contend that the Court of Appeals' footnote statement that a complaint brought pursuant to Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C § 185(a), must be filed *and served* within six months is no longer valid in light of *West*. This argument presumes that, as in *West*, the Ninth Circuit dismissed this Section 301 action because of the petitioners' failure to serve within six months an otherwise timely complaint.

In fact, the instant case is not disturbed by *West v. Conrail*. In *West*, it was undisputed that the Section 301

complaint was filed timely under Fed.R.Civ.P.3 because it was filed *less* than six months after the statute of limitations began to run. That *same* complaint was mailed to the defendants 16 days later, but more than six months after the statute began to run. Based on this straightforward set of facts, the Court held that where the complaint was timely under Fed.R.Civ.P. 3, there was no requirement to both file *and serve* the complaint within the six-month limitation period established in *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983).

By contrast, the case at hand involves a different factual pattern that is unique and unlikely ever to recur. Here, a law clerk for petitioners' counsel *mistakenly* attempted to file a complaint on November 10, 1982 — a date arguably within the six-month limitation period. 802 F.2d 1190, 1192 n.2. That complaint was returned to petitioners' counsel by the district court clerk because it did not comply with the Federal Rules of Civil Procedure in several respects. No attempt was made to refile or serve that complaint for 23 days.

Instead, on December 3, 1982 — after the expiration of the *Del Costello* limitations period — petitioners filed the complaint and served this pleading on respondents. The petitioners thus now claim that an untimely *filed* complaint commenced this action. Unlike *West v. Conrail*, this case does not involve a complaint that was filed before the expiration of the statute of limitations and then served after the six months had run. Rather, it involves the highly unusual situation of a mistaken attempt to file a complaint, a rejection by the court clerk of that complaint and no attempt whatever to refile that complaint in a timely manner.

The Court of Appeals' footnote reference to *Gallon v. Levin Metals Corp.*, 779 F.2d 1439 (9th Cir. 1986), *petition for cert. filed*, 54 U.S.L.W. 3763 (U.S. May 7, 1986), and

the holding in the case that a complaint must be filed *and served* within six months is therefore plainly dictum. 802 F.2d 1190, 1192 n.2. Because the holding of *West v. Conrail* applies only to situations where a timely-filed complaint is served after the six months elapses, and because the *only* complaint that was ever filed and served to commence the instant case was the December 3, 1982 complaint, the Court of Appeals' decision was not dependent on *Gallon*. Neither *Gallon* nor *West* overrule Fed. R. Civ. P.3 to hold that an unfiled and unserved complaint satisfies the statute of limitations.

Thus missing from this case is any ground warranting the granting of the petition for certiorari. The Court of Appeals' decision is not in conflict with *West v. Conrail*, nor does it present an important issue requiring this Court's resolution. Rather, the case involves a unique set of circumstances that is not likely to be repeated and which have no significance to anyone other than the parties hereto.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Dated: May 27, 1987

Respectfully submitted,

GIBSON DUNN & CRUTCHER

DAVID A. CATHCART
WILLIAM D. CLASTER

APPENDIX "A"

PENN CENTRAL TELECOMMUNICATIONS COMPANY

The Penn Central Corporation ..... Pennsylvania
Pennsylvania Company ..... Delaware
GK Technologies, Incorporated ..... New Jersey
Penn Central Telecommunications Company ..... Delaware
Engineering and Technical Services, Inc. ..... Florida
G & H Technology, Inc. (ownership in process) ..... Delaware
Indiana Steel & Wire Company ..... Delaware
Canadian Puregas Equipment, Limited ..... Ontario
General Cable Corporation ..... Delaware
General Cable Holdings, Inc. ..... California
GK Technologies of Canada Ltd. ..... Ontario
Gencab of Canada Limited ..... Ontario
GK Trucking Corp. ..... Delaware
Network Distribution Services, Inc. ..... Delaware
Telsta Network Services, Inc. ..... Delaware
Tri-State Utility, Inc. ..... California
General Cable International, Inc. ..... Connecticut
General Cable Export Corp. ..... New York
General Cable International Operations Limited ..... Connecticut
GK Export Corp. ..... Connecticut
Electrofinance Limited[1] ..... Cayman Islands
Forest Ltda. Fabrica de Condutores Eletricos ..... Brazil

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(1) 50% owned by Marathon LeTourneau Offshore Pty. Ltd. and 50% owned by GK Technologies, Incorporated.

Industria Venezolana de Cables Electricos S.A.[2]	Venezuela
Ceat General de Colombia S.A.[3]	Colombia
Cobres de Colombia S.A.[4]	Colombia
General Cable Compania S.A.[5]	Spain
Cables de Comunicaciones, S.A.[6]	Spain
Plasmica S.A.[7]	Spain
Saenger S.A.[7]	Spain
Depositos y Servicios-Madrid S.A.	Spain
Depositos y Serivicios S.A.	Spain
Depositos y Servicios-Bilbao S.A.	Spain
Conductores Electricos Roque S.A.[8]	Spain
Navarro S.A.[9]	Spain
General Cable Overseas N.V.	Netherlands Antilles

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(2) 92.8% owned by Electrofinance Limited.

(3) 50% owned by GK Technologies, Incorporated.

(4) 33.3% owned by Ceat General de Colombia

(5) 50% owned by Pennsylvania Company and 50% owned by GK Technologies, Incorporated.

(6) 2% owned by Plasmica S.A. and 49% by General Cable Compania S.A.

(7) 50% owned by General Cable Compania S.A., 25% owned by Pennsylvania Company and 25% owned by GK Technologies, Incorporated.

(8) 30% owned by General Cable Compania S.A.

(9) 33.3% owned by General Cable Compania S.A. and 33.3% owned by Roque

Supreme Court, U.S.
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JUN 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1738

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

FRANCIS LACINA, DAVID GALBRAITH, BILL KNIGHT, GEORGE CRAIG, TED EDWARDS, CHARLES BEESON, DONALD EVANS, ROBERT BECK, LOU RESINGER, ANDREW ROGERS, BUCK GERMANY, DAN KELLEY, MARVIN GATES, WILBURT BOND, WILLIAM GONZALES, LESTER DIXON, FRANK MATNEY, and RICK BERNAS,

Petitioners,

vs.

G-K TRUCKING, GENERAL CABLE, PENN-CENTRAL CORP., G-K TECHNOLOGIES, EASTERN CARRIERS, and ROBERT JENSEN,

Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

THE PETITION FOR CERTIORARI SHOULD BE GRANTED, THE JUDGMENT VACATED, AND THE CASE REMANDED FOR FURTHER CONSIDERATION.

I. Introduction

Respondents' Opposition to Petition for Writ of Certiorari achieves the rather remarkable feat of mischaracterizing petitioners' argument or misstating the record or both in virtually every paragraph. This reply in support of the petition is therefore necessary, if

only to permit this Court to comprehend the true basis for the petition and thus consider it on its merits.

II. Argument

To reiterate, the issue facing the courts below was whether "summary judgment in favor of [defendants] on the basis of the relevant statute of limitations" was proper. *Lacina v. G-K Trucking*, 802 F.2d 1190, 1191 (9th Cir. 1986), App. A4. To that end, those courts were required to determine whether "[plaintiffs' cause of action was filed December 3, 1982", *id.* at 1191-92, App. A5, or whether an earlier filing on November 10, 1982 was effective, *see id.* at 1192 n.2, App. A5 n.2.

The November 10 date was rejected solely and exclusively due to the file *and serve* requirement of *Gallon v. Levin Metals Corp.*, 779 F.2d 1439, 1440-41 (9th Cir. 1986), *vacated and remanded*, 107 S.Ct. 1881 (1987). Pithily, but plainly, the Court of Appeals, citing *Gallon*, ruled that "[b]ecause the November 10 complaint was never served, it does not mark the date of the filing of plaintiffs' action for purposes of the statute of limitations". 802 F.2d at 1192 n.2, App. A5, n.2.

Hence, far from being an afterthought or dicta as respondents wishfully suggest, the holding of the Court of Appeals that the November 10 filing was not effective because it was not "*served* within the six-month limitations period", *id.* (emphasis in the original), was an essential conclusion supporting its judgment. And that holding was repudiated and rejected by *West v. Conrail*, 107 S.Ct. 1538, 1541-52 (1987). Accordingly, notwithstanding the respondents'

obfuscation, the Court of Appeals "decided an important question of federal law . . . in a way in conflict with [an] applicable decision[ ] of this Court". Sup.Ct.R. 17.1(c).

The pervasive fallacy that infects respondents' argument from beginning to end is the *assumption* that the complaint that "mark[ed] the date of the filing of plaintiffs' action for purposes of the statute of limitations", 802 F.2d at 1192 n.2, App. A5 n.2, is the one filed on December 3 and held untimely, not the one submitted on November 10. But whether the November 10 complaint is effective for statute of limitations purposes is the very issue erroneously decided by the Court of Appeals that petitioners wish to have reconsidered by that court.

Under the line of cases beginning with *Loya v. Desert Sands Unified School District*, 721 F.2d 279, 281 (9th Cir. 1983), and only recently reaffirmed and expanded by *Cintron v. Union Pacific Railroad Co.*, 813 F.2d 917, 919-21 (9th Cir. 1987), petitioners are confident that this issue would be decided in their favor. That is, the Court of Appeals would decide that petitiners "constructively filed" their complaint when, on November 10, 1982, they "delivered it to the clerk of the court, though [it] was not in compliance with local ruels". *Id.* at 921.[1]

---

[1] Contrary to respondents' repeated assertions, the November 10 complaint was returned, not rejected, by the district court clerk because it failed to comply with the local rules of court, not the federal rules of civil procedure. But *Cintron* holds that the *Loya* principle applies even to filings returned for failure to comply with federal statutory requirements, *see* 813 F.2d at 920, and a fortiori it also applies to the rules of civil procedure. Consequently,

Whether or not petitioners will prevail on this issue or upon the other issues in the case such as the date their cause of action accrued are, however, matters that properly should be considered by the Court of Appeals free from its former misapprehension as to the law. And such consideration is all that petitioners seek.[2]

III. Conclusion

In sum, the opinion of the Court of Appeals for the Ninth Circuit in this action is irreconcilably in conflict with a very recent opinion of this Court on an issue of law that is possibly decisive as to the outcome of the case. Accordingly, the petition for certiorari should be granted, the judgment vacated, and the matter remanded for further consideration in light of *West v. Conrail*.

On remand, the Court of Appeals can and must decide for itself the questions that are *not* presented by this petition for certiorari, whether the complaint in fact was filed constructively on November 10, 1982 and, if so, whether the complaint nevertheless was untimely. Petitioners ask only that this Court vacate the decision and judgment below, thus permitting their action to be adjudicated pursuant to principles of civil

---

respondents' distortion of the record is of no moment.

[2] For this reason respondents' observations concerning the uniqueness of the factual situation and the low likelihood that it will recur are beside the point. Petitioners are not asking that this Court grant plenary review, only that the judgment below be vacated and the cause remanded for futher proceedings pursuant to a correct legal premise.

law enunciated while it was still sub judice. In order to achieve that eminently just result, the petition for certiorari should be granted.

Dated: June 9, 1987

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Los Angeles, California 90025; that on June 9, 1987, I served the within *Petitioners' Reply Brief* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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Supreme Court
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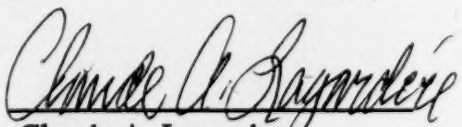
I declare under penalty of perjury that the foregoing is true and correct. Executed on June 9, 1987, at Los Angeles, California.



Claude A. Lagardere
(Original signed)